

Protest of)	Date: February 4, 1988
)	
VNP VENDING CORPORATION)	
)	P.S. Protest No. 87-107
Solicitation Nos. 489990-87-A-0622,)	
-0624, -0625, -0626, -0627,)	
-0633, -0634, -0635)	

DECISION

VNP Vending Corporation (VNP) timely protests the cancellation of the above-referenced solicitations for the installation of coin-operated photocopy machines in numerous postal facilities in Texas and Oklahoma.^{1/} The protester alleges that the cancellation did not conform to the requirements of Postal Contracting Manual (PCM) 2-404.1, which provides that "award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation."

These solicitations were issued between July 15 and 17, 1987, with offer due dates, as amended, of August 21, 1987. The solicitations required that bids would be accepted on plain paper copiers, and that bids would be evaluated by multiplying the commission offered by the vendor by the copy price (\$0.25) times the estimated number of copies. The solicitations provided a breakdown of the total estimated number of copies, and left it up to the vendor to bid the amount of commission for a particular number of copies. For example, Solicitation No. 489990-87-A-0633 for copiers for post offices in the San Antonio Management Sectional Center, had an estimate of 900 copies per copier. VNP bid commission percentages of 0% for the first 400 copies, 10% for the next 400 copies, and 750% for each copy in excess of 800. The contract term was to be for three years, but either party would have the right to terminate the contract without liability upon 60 days written notice.

The contracting officer cancelled the solicitations on September 28, 1987.^{1/} He

^{2/}VNP originally protested the cancellation of only seven solicitations, leaving out Solicitation No. 489990-87-A-0635. However, in its comments dated November 12, 1987, VNP also refers to that solicitation.

^{3/}Two protests had been received on these solicitations. E-Z Copy, Inc., of California protested the terms of the solicitations, arguing that the requirement that the copiers use only plain paper, rather than chemically-treated paper was unduly restrictive and not in the best interest of the Postal Service. After bid opening, Pitney-Bowes, Inc. protested award to the low bidders on the solicitations (E-Z Copy Systems of Texas and VNP), stating that neither bidder met the three-year experience criteria set out in the solicitations and that both bidders' bids represented "buy-ins", disfavored under postal regulations, and would not represent the highest revenue to the Postal Service. After the cancellations, these

explained the cancellations as follows:

It has been determined by the Contracting Officer that cancellation of this solicitation is in the best interests of the Postal Service. The evaluation of offers, Section 19, has been revised to add a provision that commissions offered to the USPS cannot exceed 100 percent. In compliance with this determination the solicitation is canceled in accordance with Postal Contracting Manual [PCM] 2-404.1(ii).

VNP then protested the cancellations to our office. VNP asserts that its bids would garner the greatest amount of revenue for the Postal Service; therefore, award to it would be in the best interest of the Postal Service. Moreover, the protester states that the "purported" basis of the cancellation, that "commissions offered to the USPS cannot exceed 100 percent" constitutes neither a "compelling reason" for the cancellation nor a permissible rationale because it creates an auction. The protester urges that any resolicitation would be unfair to it "because the disclosure of the bids and the notice to all offerors that VNP Vending is the low offeror places VNP Vending in an untenable position on any resolicitation." In addition, VNP asserts that the proposed changes in the evaluation factors would result in a resolicitation and award for less revenue to the Postal Service than is represented by its bids.

The contracting officer's response states that, while the commissions offered by VNP appear to provide the greatest revenue to the Postal Service, the bids are premised upon the expectation that the estimated number of copies would not be run and that VNP would pay only a small commission, if any, on the below-estimated number of copies. Accordingly, if the copy volume does not approach the estimate, the Postal Service would be providing space, power and an employee to collect and account for monies in

protests were dismissed as moot on October 7, 1987.

exchange for no or minimal remuneration from VNP. Further, the contracting officer states that, as a result of the inclusion of the sixty-day termination clause in the solicitation, if the estimated number of copies were reached or exceeded, VNP would be required to pay the Postal Service the highly indexed commission for only two months. The contracting officer posits that VNP is in a no-lose position: If the number of actual copies run is below the estimates, it reaps a windfall profit; if the number of actual copies is above the estimate, it terminates the contract and only pays for two months of losses. By revising the evaluation provisions, the contracting officer proposes to prevent bidders from trying to manipulate the contract and to allow all bidders' submission of realistic commission rates.^{1/}

Pitney-Bowes, Inc., submitted comments in support of the Postal Service's decision to cancel the solicitations. Pitney-Bowes stated that the cancellation, which was based on a defect in the solicitation not apparent until after bid openings, was reasonable. It identifies the flaw in the solicitation as allowing the bidders to bid more than 100 percent of the commission, which Pitney-Bowes believes will allow bidders to manipulate the pricing and "deter bidders from submitting realistic commission rates for evaluation." Pitney-Bowes states that VNP will not be prejudiced by the cancellation, since it will have to restructure its bids entirely.

VNP submitted comments on the contracting officer's report which reiterates the points made in its initial protest and alleges that the contracting officer has violated the regulatory requirements by cancelling these solicitations without specific reasons. It raises an additional complaint concerns the bid-opening officer allowing Pitney-Bowes to review VNP's bids and have access to its confidential business data. VNP strongly urges that its bids are neither impermissible buy-ins nor materially unbalanced. It emphasizes that, since no question has been raised as to the validity of the solicitation estimates, and our office should not be able to find such inaccuracy on our own, it is indisputable that its bid leads to the most revenue for the Postal Service and should have been accepted for award.

In response to our request for supplemental comments, the contracting officer affirms that the estimates used are accurate, that the cancellations are justified by PCM 2-404.1(b)(ii), which allows cancellation upon a determination that the specifications have been revised, and that, while the bid opening officer erroneously and inadvertently allowed Pitney-Bowes to examine VNP's bids, there was nothing in the bids which would provide Pitney-Bowes with a competitive advantage. We understand that bid opening on the resolicitations has been delayed until February 11 pending resolution of this protest, and that the current contracts have been extended through March 31, 1988. VNP replies that the contracting officer has yet to enunciate a justifiable reason for canceling the solicitation.^{1/}

^{4/}Texas Copy submitted comments on VNP's protest, alleging that the solicitations are flawed because the specifications are not consistent with those used in other regions, and, as such, bids on treated-paper copiers should be permitted. Texas Copy thus raises issues similar to the prior protest filed by E-Z Copy of California. In addition, to the extent that the comments of Texas Copy can be deemed to be a protest, it is untimely. The protest, as it is against the terms of the solicitation, must have been made prior to award.

^{5/}It also submits a confidential business analysis which shows that it would sustain significant costs if it

Before discussing the merits of VNP's protest, we first treat a timeliness issue with regard to Solicitation No. 489990-87-A-0635. This solicitation was not included in the list of solicitations on VNP's original protest letter, but was included in its supplemental comments. It is well settled that a bid protest must be timely filed, in this case, within 10 working days after the information on which the protest is based was known or should have been known. PCM 2-407.8 d. (3); see International Jet Aviation Services, P.S. Protest No. 86-36, September 1, 1987; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983. VNP clearly knew that all eight solicitations had been cancelled on September 1, 1987. Its failure to include Solicitation No. -0635 in the solicitations initially protested can only be read to exclude that solicitation from the protest. Therefore, VNP's allegations, insofar as they concern Solicitation No. -0635 are untimely and must be dismissed.

Cancellation of formally advertised bids is governed by PCM 2-404.1, which provides, in pertinent part, as follows:

(a) To preserve the integrity of the formal advertising competitive bid system, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

* * *

(b) Invitation for bids may be canceled after opening but prior to award when such action is consistent with

(a) above and the contracting officer determines in writing that-

* * *

(ii) Specifications have been revised;

* * *

(viii) For other reasons, cancellation is clearly in the best interest of the Postal Service.

Determination to cancel invitations shall state the reasons therefor.

Because of the potential harm to the integrity of the sealed bidding system, contracting officers, in exercising their broad discretion to cancel solicitation, must have cogent and

exercises its right to terminate the contracts, and states that the Postal Service should not be concerned about this issue.

compelling reasons to warrant cancellation. Garden State Copy Company, Southern California Copico, Inc., P.S. Protest No. 82-84, September 1, 1983; Alden Electronics, Inc. -- Reconsideration, Comp. Gen. Dec. B-224160.2, B-224161.2, March 12, 1987, 87-1 CPD & 277. The standard for review of a contracting officer's determination to cancel a solicitation is that such a decision will not be overturned by this office, unless the decision is arbitrary, capricious, or not supported by substantial evidence. Garden State Copy Company, Southern California Copico, Inc., *supra*; Mancone Trucking, Inc., P.S. Protest No. 80-61, January 21, 1981; Grant Rental, Inc., P.S. Protest No. 79-29, August 1, 1979.^{1/}

The reason given by the contracting officer for the cancellation was his concern that, without a limitation of 100 percent of the commission on the bids, bidders would manipulate the solicitations, making a windfall profit if the actual number of copies fall below the estimate, but quickly canceling the contract if they exceeded the estimate. This concern reflects the similar position expressed promptly after the bid opening by Pitney- Bowes, and reasserted here, that VNP's bid constituted a buy-in and would not (because of the 60-day cancellation provision) actually result in the maximum revenue to the Postal Service over

^{6/}VNP asserts in its comments, dated November 12, 1987, that at bid opening, representatives of Pitney-Bowes were given access to VNP's entire bid package, including confidential business data. The contracting officer admits that Pitney-Bowes examined portions of VNP's bid to which it was not entitled. VNP was not prejudiced by the examination by Pitney-Bowes because the information contained therein would not give VNP's competitors an advantage over VNP in future procurements.

the full contract term, even if the solicitation volume estimates were met.

Contrary to Pitney-Bowes' view, buy-ins are not prohibited per se. Neither PCM 1-310 nor any other regulatory provision works such a prohibition. See, e.g., Blane Enterprises, Inc., Comp. Gen. Dec. B-224416, October 17, 1986, 86-2 CPD & 466 ;see also Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984 (below cost bids not prohibited). Of course, to the extent that an offer appears to understate the offeror's cost of performance, it may raise questions concerning the financial or technical capabilities of the offeror and its ability to perform, matters which are properly for consideration by the contracting officer in the determination of the offeror's responsibility. Cf. PCM 1-902.¹⁷

Clearly, analysis of VNP's bids suggests bases on which to question their profitability, and accordingly VNP's ability to perform them successfully. Under the contract scheme, using Solicitation No. -0633 as an illustrative example, revenue is distributed to the parties as follows:

Number of Copies	USPS Revenue	VNP Revenue
1-100	\$ 0	\$25.00
101-200	\$ 0	\$25.00
201-300	\$ 0	\$25.00
301-400	\$ 0	\$25.00
401-500	\$2.50	\$22.50
501-600	\$2.50	\$22.50
601-700	\$2.50	\$22.50
701-800	\$2.50	\$22.50
801-900	\$187.50	\$ 0
901-1000	\$187.50	\$ 0
		<u>etc.</u>

Under this compensation scheme, VNP loses money once copier usage exceeds 903 copies (VNP revenue on copies 1-800 = \$ 190; USPS revenue on copies 801-903 = \$ 191.25). Further, once public copier use during any monthly term exceeds 109 copies, the Postal Service could obtain all the additional copies necessary to meet the contract's estimated quantity at no net cost by purchasing each copy at the contract vend rate. (Postal revenue from copies 1-900 = \$198.00; cost of copies 109-900 = \$198.00.) Of course, any further usage beyond the Postal Service estimate would impose greater losses on the contractor at a net cost of \$1.625 per copy (\$1.875 - .25).¹⁸

¹⁷These questions, which are matters of responsibility and do not pertain to the acceptability of its bid, have not yet been determined, as far as the record before us indicates. They are not, therefore, presently grounds for a bid protest. Kahn Industries, Inc., P.S. Protest No. 85-56, August 26, 1985.

¹⁸These examples do not include various cost elements otherwise inherent in the contract such as VNP's costs to provide and maintain the copy machines and the Postal Service's costs to load the machines, provide them with electricity, and collect the coins. These costs, while significant, are offsetting, and their omission does not affect the analysis.

These calculations strongly suggest, even in the face of VNP's assertions to the contrary, that given copier usage consistent with the Postal Service's volume estimates, VNP will have significant financial incentives to terminate performance under the contracts.¹⁷

Although this is not a case in which VNP, the apparently successful bidder, has asserted that it made a mistake in its bids, the regulations on mistakes-in-bid, by analogy, offer some support for the contracting officer's action here. PCM 2-406.3 (c)(ii) allows a contracting officer to reject a bid as mistaken, even if the bidder verifies it, if:

there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. Incompetence, carelessness, or over-optimism of management may cause or permit the making of bids or proposal for work involving techniques, processes, or "know-how" on which the contractor has no significant experience. In such case, the contractor's proposed price, or cost estimates, whether or not comparable to those of contractors of demonstrated competence, may be unrealistic and may seriously endanger performance.

Even if the bidder zealously maintains that its bids are not in error, a contracting officer need not award a contract to bids which meet this standard, and we have directed rescission of contracts awarded in contravention of this provision. See, e.g., Howard Electric Company of Concord, Inc., P.S. Mistake Claim No. 82-8, December 6, 1982; R.A.N. Development Corporation, P.S. Mistake Claim No. 80-12, September 30, 1980; R.C. Tool & Machinery Sales, P.S. Mistake Claim No. 80-9, November 28, 1980.

A bid may also be rejected if it is defectively unbalanced, that is, if (1) it is mathematically unbalanced and (2) it is also materially unbalanced, that is, there is a reasonable basis for doubt that an award would result in the greatest return to the Postal Service. See E-Z Copy, Inc. and Hawaii Copico, P.S. Protest Nos. 86-48, 86-50, August 1, 1986; Howell Construction, Inc., Comp. Gen. Dec. B-225766, April 30, 1987, 87-1 CPD & 455. VNP's bids are mathematically unbalanced because they are structured on the basis of minimal commissions for initial work and inflated commissions for subsequent work.

Recent Comptroller General decisions indicate that bids which are as grossly unbalanced as VNP's may be fatally flawed. See generally Howell Construction, Inc., supra (the existence of reasonable doubt is a "factual determination which varies depending upon the particular circumstances of the procurement"); All Weather Contractors, Inc., Comp. Gen. Dec. B-217242, July 23, 1985, 85-2 CPD & 71, (bids

¹⁷VNP attempts to diffuse the perception that its bid is skewed in its December 21 comments on the Contracting Officer's Supplemental Report. As noted above, the comments include a confidential business analysis, seeking to demonstrate that VNP would sustain significant costs if it exercises its contractual right to terminate the contracts. However, the analysis does not overcome the fact that the contracts, as bid by VNP, provide a loss to VNP when copier usage nears the Postal Service estimates.

may be found to be materially unbalanced where "there is evidence of some irregularity of such substantial nature as will affect the competitive bidding system"); Riverport Industries, Inc.--Request for Reconsideration, Comp. Gen. Dec. B-218656.2, July 31, 1985, 85-2 CPD &108, (bid is mathematically unbalanced where it, when viewed as a whole, "is grossly unbalanced mathematically", such that its pricing structure "is completely out of line" with that of the other bids submitted). Here, although the evaluation scheme seems to indicate that VNP's bid would result in the greatest revenue to the Postal Service, there is substantial doubt that VNP would remain in a clearly unprofitable contractual relationship for more than a few months. As such, VNP's bids are materially unbalanced.

The above analysis establishes that VNP's bids could properly be rejected. Usually, this would lead to review of the second most advantageous bidder for award rather than cancellation of the solicitation. However, since no interested party other than VNP has objected to the cancellation, and we have held that VNP's bids were properly not for consideration, there is no remaining issue before us as to the propriety of the cancellation.¹⁷

^{10/}If any party is prejudiced by the cancellation, it is Pitney-Bowes, whose bid would be allowed under the revised solicitations, rather than VNP.

The protest is denied as to all solicitations except No.
-0635, as to which it is dismissed.

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[checked against original JLS 3/12/93]